

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-223

February 20, 2004

MAINE PUBLIC UTILITIES COMMISSION
Maine Telecommunication Education Access
Fund

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we provide funding from the Maine Telecommunications Education Access Fund (MTEAF or the Fund) to support the Maine Learning Technology Initiative (MLTI) for FY 2004 and the University of Maine System (UMS) for electronic databases for fiscal years 2004 and 2005, contingent on the award of Federal E-Rate funding. We will provide libraries choosing not to filter with MTEAF funds up to the amount that they would receive for Internet service if they accepted Federal E-Rate funds (approximately 40% of the monthly charge), but we do not approve paying from MTEAF half the amount they would have received from Federal E-Rate.¹

II. BACKGROUND

The Commission has before it three requests for funding from the MTEAF. We describe each request below.

A. Maine Learning Technology Initiative

On December 17, 2003, the Commission received a request from the Department of Education for \$2.25 million to support the Maine Learning Technology Initiative (MLTI) for fiscal year 2004. The Commission, by Order issued on September 14, 2001, agreed to provide MLTI up to \$9 million in funding over a four-year period, capped at \$2.25 million per year from the MTEAF. By Order issued on December 5, 2002, the Commission directed transfer of \$2.25 million from the MTEAF to the MLTI to support the initiative in fiscal year 2003. We found that providing these funds was consistent with the legislative directives in Public Laws 2001, Chapter 358, Section II-7 (4) and 2001, Chapter 559, Section LL.

By Procedural Order issued on January 13, 2004, the Commission sought comments on the request by January 30, 2004. The Commission received no comments on the MLTI request.

B. State Library Request

¹ Commissioner Reishus dissents from this part of the Order and instead would approve the entire funding request made by the State Librarian. See attached Dissenting Opinion.

On December 29, 2003, the Commission received a request from State Librarian Gary Nichols concerning libraries that choose not to accept Federal E-Rate for Internet service due to their concerns that Federal filtering requirements are inconsistent with freedom of access to information principles and that such filtering decisions should be a local decision. For FY 2005, Internet access costs \$140 per month. It is expected that Federal E-Rate will pay approximately 60% of this cost and MTEAF will pay the remaining portion. Mr. Nichols proposes that the Commission continue to provide MTEAF funds for 40% of the monthly charge of \$140, with the library assuming half of the remaining 60% and MTEAF covering the other half. If all 260 libraries choose this option, it will cost the MTEAF fund an additional \$131,040 over what would typically be expended to support Internet access (\$174,720) for libraries. The State Library is willing to collect the payments from libraries and remit them to the MTEAF Administrator. By Procedural Order on January 13, 2004, the Commission sought comments on whether to make these additional expenditures. The Commission also requested comments on whether this arrangement meets the 35-A M.R.S.A. § 7104-B(6) requirement that schools and libraries shall apply for any available Federal discounts.

The Commission received 22 comments supporting the request. Most were from libraries and supported the provision of the funding as a way to leave the choice about filtering at the local library level. The Commission received a letter from the Telephone Association of Maine opposing the request because it believes that libraries should maximize the available Federal funds before using MTEAF.

C. UMS Request

The Commission received a letter from UMS on January 15, 2004 requesting \$500,000 for Fiscal Year 2004 and \$500,000 for Fiscal Year 2005² to allow it to continue providing statewide access to electronic databases. The letter explains how UMS has purchased access to over 7000 magazines and journals (and indexing for thousands more), 500 news sources, Britannica Online and additional business resources during the last two years. Usage of the databases by the public and students has increased in each of the past three years.

MTEAF provided funding for access to these databases in FY 2002 and FY 2003 as required by Public Law 2002, chapter 522. The law was silent as to funding in years beyond 2003. However, the law also amended Title 35-A M.R.S.A. § 7104-B to allow the MTEAF to be used to fund “content” (in addition to telecommunications services, internet access, internal connections, computers and training). 35-A M.R.S.A. § 7104-B(4)(F). It also added a guideline for funding: “To provide for electronic database content to be used for the purposes of accessing information by schools and

² The UMS letter contained a request both for \$500,000 each year and for \$510,000 in FY 2004 and \$520,000 in FY 2005. UMS subsequently clarified by letter dated January 28, 2004 that the request was for \$500,000 in each year.

libraries.” 35-A M.R.S.A. § 7104-B(5)(H). Therefore, purchasing access to the databases described by UMS in its request is eligible for funding under MTEAF.

By Procedural Order issued on January 23, 2004, the Commission invited comments on the request. The Commission received over 107 comments in support of the request. One commenter opposed charging telephone customers for this service.

III. COMMISSION AUTHORITY TO PROVIDE FUNDING

The Commission’s authority to provide funding from the MTEAF is guided by State statutory provisions, unallocated language in a number of legislative enactments and Federal statutory requirements.

A. Statutory Provisions for MTEAF

Title 35-A M.R.S.A. § 7104-B authorizes the Commission to establish a telecommunications education access fund. Monies in the Fund come from a 0.5% surcharge on retail charges for telecommunications services. The Fund is to be used to pay the cost of acquiring and using advanced telecommunications technologies by qualified libraries, schools and the Raymond H. Fogler Library at the University of Maine. The funds may be used for telecommunications services, Internet access, internal connections, computers, training and content. The provision of funds from the MTEAF is to be coordinated with any available federal funds, and schools and libraries are required to “apply for any federal discounts available pursuant to the federal Telecommunications Act of 1996.” 35-A M.R.S.A. 7104-B(6).

B. Other State Statutory Requirements

Public Law 2001, Chapter 358 (enacted in Spring 2001), created MLTI. Section II-7(4) of the law directs the Commission to enter appropriate orders or take appropriate actions to ensure that capacity is developed and expanded to provide external and internal network connections, technical support and toll-free home network access to support the seventh and eighth grade laptop deployment. The Commission agreed to provide up to \$9 million in funding over four years for this purpose. Order, Docket No. 2001-223 (Sept. 14, 2001).

Public Law 2001, Chapter 522 (enacted in Spring 2002), provides for the creation of a Digital Library. The law amends 35-A M.R.S.A. § 7104-B by making “content” eligible for funding by the MTEAF and making the Fogler Library eligible for participation in the Fund. The law directed the Commission to transfer \$500,000 to UMS in both FY 2002 and FY 2003 to create a digital library accessible statewide.

In addition, in March 2002, as part of the budget bill, the Legislature further directed that:

Notwithstanding any other provision of law, the Public Utilities Commission shall ensure that, over the 4-year period beginning

August 1, 2002, at least \$2,000,000 from the telecommunications education access fund, in addition to funds collected pursuant to the Maine Revised Statutes, Title 35-A, section 7104-B during the period June 1, 2002 through May 31, 2006, are available for purposes other than to support the learning technology plan established pursuant to Public Law 2001, chapter 358, Part II and the digital library at the University of Maine established pursuant to Public Law 2001, chapter 522. Nothing in this section precludes the commission from expending up to \$2,250,000 prior to August 1, 2002 from the Telecommunications Education Access Fund to support the learning technology plan if the provisions of this Part are otherwise satisfied.

P.L. 2001, chapter 559, Section LL.

C. Federal Filtering Requirements

The Federal Child Internet Protection Act (enacted by Congress in 2001) requires schools and libraries with “computer Internet access” to certify that they have in place Internet safety policies and technology protection measures, e.g., software filtering technology, in order to receive discounts for Internet access under the Federal E-Rate program. The American Library Association and others challenged these provisions as they applied to libraries as violating the First Amendment of the United States Constitution. In May 2002, a three-judge federal district court agreed and enjoined the Federal Communications Commission from withholding federal funds from libraries for failing to comply with CIPA’s provisions. In June 2003, the United States Supreme Court reversed the judgment of the district court, finding that CIPA, on its face, is constitutional.

The FCC then adopted measures to bring libraries receiving E-Rate funds for Internet service into compliance. The FCC requires libraries receiving discounts in 2003 to certify that they are either compliant with CIPA or undertaking efforts to become compliant by Funding Year 2004 (beginning July 2004). Libraries must be fully compliant with CIPA by Funding Year 2004 (unless a library receives a waiver due to state or local procurement rules or competitive bidding requirements preventing compliance). *Federal-State Joint Board on Universal Service, Childrens’ Internet Protection Act*, CC Docket No. 96-45 Order (July 24, 2003).

IV. FUNDING AVAILABLE

In addition to the statutory and legislative requirements described above, the Commission must consider the funds available in deciding what services to pay for from MTEAF. The Commission is currently collecting approximately \$3.4 million per year from the annual 0.5% assessment on intrastate revenues. In addition to these ongoing collections, when the first phase of Maine School and Library Network project ended in June 2001, the Commission in August 2001 directed Verizon to turn over any unspent

funds from that project to the MTEAF. Verizon transferred a total of \$8,876,085 to the Fund in 2002.

During the period July 2001 to June 2002, the Commission approved using MTEAF to continue to pay for Internet access and connections for all qualified schools and libraries. The State Library and Department of Education submitted a consortium Federal E-Rate application for all schools and libraries. Federal E-Rate provided discounts equaling \$2.448 million and the MTEAF paid the remaining costs (\$2.833 million).³ The E-Rate funding was not received until the Fall of 2002. The Commission subsequently approved the same arrangement for the years 2002 and 2003.⁴ Currently, the total bill for keeping schools and libraries connected to the Internet is approximately \$6.1 million per year. The agency administering the Federal E-Rate has not acted upon Maine's 2002 and 2003 applications. Therefore, the MTEAF has paid all expenses for 2002 and over half the expenses for 2003. The Commission expects reimbursements from the Federal E-Rate totaling \$6 million for 2002 and 2003. As of January 31, 2004, the MTEAF had a balance of \$2,572,738 and expects to collect an additional \$1,455,285 prior to June 30, 2004. Additional expenses for 2004 will be approximately \$4,349,000. If no Federal E-Rate funds are received prior to June 30, 2003, the entire balance in the Fund will be needed to pay current commitments associated with Internet services and connections.

V. DECISION

Based on the above discussion, we make decisions about providing funding from the MTEAF on four criteria:

1. Is the request consistent with 35-A M.R.S.A. § 7104-B which created the Fund and authorized the Commission to implement the Fund?
2. Is the request consistent with any other state or Federal statutory requirements?
3. Are there sufficient funds available to fund the request?
4. Would granting the request be equitable to all affected parties?

A. MLTI REQUEST

The letter from the Commissioner of Education lists at least \$3.982 million in MLTI expenses that will be incurred in FY 2004 related to external and internal network connections and technical support (total MLTI expenses for FY 04 are \$10.780 million). As described above, the Legislature has directed the Commission to provide financial support for "external and internal network connections, technical support, and toll-free network access from home." Having reviewed the filing submitted by DOE, we

³ The Federal E-Rate program recently granted an appeal and awarded an additional \$286,246 for the year 2001.

⁴ The Federal E-Rate cycles run from July to June.

find that \$2.25 million should be provided from MTEAF funds for FY 2004 consistent with P.L. 2001, ch. 358.

However, we must condition our approval for this transfer upon the receipt of approval of the State's Federal E-Rate consortium application for either 2002 or 2003. Once those monies are received we will authorize the transfer to the MLTI.

As we stated in our Order approving funding for FY 2003, in approving this funding, we recognize that P.L. 2001, chapter 559 requires that at least \$2 million from the MTEAF fund be available by May 2006 for purposes other than MLTI and digital library databases. Nothing we do today in approving the DOE's request compromises our ability to meet this mandate, because we will not authorize the transfer until we are assured we can meet the requirement. We acknowledge that in the future it may be difficult to meet the MLTI commitment as well as the other mandates, unless additional funds are available, such as from Federal E-Rate. We will deal with these issues as they arise and do our best to honor the legislative directives under the various statutes relating to the use of MTEAF funds.

C. UMS Databases

As indicated by the comments we received, many library patrons, students, and Maine citizens are making use of the databases. Funding these databases is consistent with 35-A M.R.S.A. § 7104-B requirements. Once again, we are willing to commit funding for the databases for FY 2004 and FY 2005 contingent on the receipt of approval of the State's Federal E-Rate consortium application for either 2002 or 2003. Once those monies are received, we will authorize the transfer to UMS.

D. Request of State Librarian

The State Librarian has described the following dilemma faced by some libraries. Title 35-A M.R.S.A. §7104-B(6) requires libraries to apply for any federal discounts available pursuant to the Telecommunications Act of 1996 (which authorized the E-Rate program). To apply for and receive Federal E-Rate funds for Internet Service,⁵ a library must certify that it has undertaken "technology protection measures." Many libraries oppose such filtering as a violation of their patron's First Amendment rights. The MTEAF is currently paying for an enterprise-wide filtering solution that any school or library can opt-into at no additional charge. All schools are currently filtering. Only 12 libraries are using the MTEAF provided filtering.

The State Librarian has asked that for those libraries that choose not to filter, that MTEAF continue to provide the MTEAF discount they would have received if they had applied for Federal E-Rate (approximately 40% of cost of Internet). He also

⁵ The FCC imposes the filtering requirement on schools or libraries requesting discounts for Internet Services. It does not apply to discounts for Telecommunication Services.

asks the Commission to use MTEAF funds to pay 50% of the remaining 60%, with the library paying the remaining 50%.

The request of the State Librarian presents us with two questions. The first is whether 35-A M.R.S.A. § 7104-B(5) precludes us from providing any MTEAF funding to a school or library that declines to avail itself of Federal funding because it objects to a condition attached to that funding. While this question is not entirely free from doubt, we reject such an inflexible reading of the statute. When § 7104-B(5) was enacted in 1999, there were no Federal filtering requirements associated with E-Rate funding. In addition, the statute is silent on the ability of a library to decline Federal funding because of a condition it finds objectionable. Given that the policy behind the MTEAF is to make the Internet broadly available in Maine, we think the more appropriate interpretation of the provision is that it does not preclude us from funding a library under the circumstances present in this case.

The second question is whether we should provide libraries that reject Federal E-Rate support because of the filtering requirement with what would be tantamount to additional MTEAF funding to compensate for the lost Federal money. While we understand that this is a matter of principle for these libraries, we do not think it fair to other schools and libraries to use our scarce resources to subsidize their decision. In addition, we do not believe the Legislature intended that the Commission, as the administrator of the MTEAF, should resolve such a fundamental policy question as the appropriateness of a filtering requirement. To the contrary, we believe that the request of the State Librarian is best made to the Legislature and that unless and until the Legislature acts, we should take a neutral position by providing the same percentage of state funding to all schools and libraries. In reaching this conclusion, we offer no opinion on filtering or on how the Legislature should resolve the issue if it is presented to it.

For these reasons, we will continue to provide support for Internet service at the same level as we have in the past.

Dated at Augusta, Maine, this 20th day of February, 2004.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus, concurring in part and dissenting
 In part. See attached Dissenting Opinion

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.

**Dissenting Opinion of
Commission Reishus**

I concur with the Decision, with the exception that I believe the request of the State Librarian should have been granted in full.

Without taking a position on the merits of Internet filtering itself, the fact remains that this year a potentially large number of the state's public libraries will lose Federal E-Rate funding of their Internet service, as State Librarian Nichols noted in his request for additional MTEAF funding. While I support the majority's view that the Legislature is the appropriate body in which to address the policy issues surrounding the shortfall in federal funds that arises from local decisions to reject compliance with CIPA, I think it unlikely that state legislative action could be taken quickly enough in the current session to remedy the loss of Federal E-Rate funding for this year. Furthermore, based on my reading of the section in question, the law required schools and libraries to apply for federal subsidies before receiving state funds in order to receive unfiltered Internet service. I see nothing in the statute to suggest that the Legislature at the time considered and accepted as reasonable the outcome before us now that there would be a complete loss of the Federal E-Rate funding to towns that have made the choice not to filter their Internet service.

For some libraries, the financial burden of losing 60% of their government subsidy for public access to the Internet for this year will be very difficult to bear, as noted in a number of the comments filed by interested parties, particularly in the more rural areas of the state that may face the greatest need for free Internet access. I found the State Librarian's request that only half of the federal shortfall be made up by the state, using a very small portion of the total MTEAF fund, with the other half to be made up locally, to be an equitable compromise. Libraries that choose to accept Federal E-Rate funds by complying with CIPA will continue to receive a complete subsidy of their Internet service and will be no worse off than libraries that choose not to filter. Indeed, under my recommendation, those libraries that choose not to comply with CIPA would have received only a 70% combined federal and state subsidy for their Internet service.